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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

KATHY HANNA MUSHARBASH,

Defendant and Appellant.

E049047

(Super.Ct.No. FWV801844)

OPINION

APPEAL from the Superior Court of San Bernardino County. Raymond L. Haight
III, Judge. Affirmed.

Vicki Marolt Buchanan, under appointment by the Court of Appeal, for Defendant
and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Gary W. Schons, Assistant Attorney General, James D. Dutton and
Melissa Mandel, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant, Kathy Hanna Musharbash, appeals from her conviction on one charge of petty theft with a prior conviction (Pen. Code, § 666)¹ and her three-year prison sentence. Defendant argues the trial court prejudicially erred when it concluded that a prior theft conviction is an element of the crime of petty theft with a prior conviction and disclosed the prior conviction to the jury after defendant stipulated to the prior conviction. As discussed below, we conclude that, while the trial court erred when it allowed the prosecutor to tell the jury about defendant's prior theft conviction, the error was harmless because the evidence of defendant's guilt was overwhelming.

FACTS AND PROCEDURE

On June 19, 2008, defendant selected three boxes of perfume from the fragrance department at a JC Penney store. There was no cashier present in that department. Defendant then left the fragrance department and, after walking closely along a wall, went behind a clothing rack and, one at a time, placed the boxes of perfume into a Victoria's Secret shopping bag she had brought into the store. Defendant then went to the women's shoe department and selected a pair of shoes from a rack and took them to the cashier in the men's shoe department. As she did so, defendant passed a store loss prevention officer, who was able to see the perfume boxes inside the Victoria's Secret bag. Defendant purchased the shoes for \$26.99 and walked toward the exit into the shopping mall, lingering by the theft detection pylons. The pylons did not activate. The store security officer stopped defendant just outside the store and took her to his office.

¹ All section references are to the Penal Code unless otherwise indicated.

Inside the Victoria's Secret bag were the three boxes of perfume, which sold at retail for a total of \$186.00.

On September 10, 2008, in a first amended information, the People charged defendant with one count of petty theft with a prior. The information also alleged three prior theft related convictions for which defendant had served time in a penal institution, as well as two prison priors (§ 667.5).

The People filed a motion in limine to admit defendant's prior theft convictions as impeachment evidence should she decide to testify. The trial court ruled it would allow the prosecution to impeach defendant with a 2005 conviction for grand theft if she testified. The parties agreed to stipulate to that prior as the prior conviction for the purposes of section 666.

The jury trial began on April 13, 2009. At the close of the prosecution case, and over defendant's objection, the trial court had the prosecutor read to the jury the stipulation regarding the prior theft conviction. During the defense case, defendant took the stand in her own defense. The trial court allowed the prosecution to impeach defendant on the 2005 conviction, and it did so. On April 16, 2009, the jury found defendant guilty.

On June 26, 2009, the trial court sentenced defendant to three years in prison—two years for the petty theft with a prior conviction, plus one consecutive year for the prison prior. This appeal followed.

DISCUSSION

Defendant contends this Court should reverse her conviction because it erred when it allowed the prosecution to disclose to the jury the 2005 grand theft conviction after defendant had already stipulated to the prior conviction, and that this error prejudiced defendant. The People argue that this error was harmless because the conviction was properly admitted to impeach defendant and defendant was not prejudiced because the evidence of defendant's guilt was overwhelming.

A defendant charged under section 666 may stipulate to the prior conviction and thus preclude the jury from learning of that conviction. (*People v. Bouzas* (1991) 53 Cal.3d 467, 478-480.) Here, the parties stipulated to the prior conviction. However, at the close of the prosecution case, and over defendant's objection, the trial court had the prosecutor read to the jury the stipulation regarding the prior theft conviction: "The prosecution and defense have stipulated that the defendant was previously convicted of a theft offense. The defendant served a term in a penal institution for that conviction."

The People agree that the trial court committed error when it allowed the prosecutor to read this stipulation to the jury. However, the People argue the error is harmless, both because the prior conviction was properly admitted to impeach defendant, and because the evidence against defendant was overwhelming.

Impeachment

Where the jury is improperly allowed to learn of a defendant's prior conviction, the defendant suffers no prejudice where the jury would otherwise have learned of the conviction, such as "when it is clear prior to trial that the defendant will testify and be

impeached with evidence of the prior conviction” (*People v. Calderon* (1994) 9 Cal.4th 69, 78 (*Calderon*)). Here, while ruling on pretrial motions and dealing with scheduling matters, the trial court ruled that it “will permit the prosecution, *if the defendant testifies*, to use the May 26th, 2005, felony conviction for grand theft to impeach.” Shortly thereafter, the trial court asked defense counsel whether he could, for scheduling purposes, call defendant to the stand prior to calling her doctor to testify. Defense counsel explained to the judge that he could not because he would not decide for certain whether he would call defendant to the stand until after the doctor and other witnesses had already testified.

“THE COURT: . . . I know defense attorneys would usually like to call their client last, but just so we can make good use of tomorrow’s time would you put your client on before the doctor because we’re going to end up not doing anything tomorrow afternoon is the way it looks.

“[DEFENSE COUNSEL]: And I know, Your Honor, the problem that I’ve always had with calling my client out of order is I have to make an analysis of how strong my case is after all the evidence is presented. If the doctor goes up there and does a great job, I may not call my client. If he goes up there and fumbles, then I may have to call my client to glue everything together. It’s very difficult to know that until there’s been introduction of all the testimony of all my witnesses.”

The prior conviction was not properly admitted to impeach defendant because, under *Calderon, supra*, 9 Cal.4th at p. 78, it was not clear prior to trial that defendant would testify and then be impeached by the prior conviction. This is because defense

counsel explicitly stated before trial that he was not sure whether defendant would testify. Thus, the error in reading the stipulation to the jury was not harmless on this ground.

Overwhelming Evidence of Guilt

We must now determine whether the error prejudiced defendant by examining whether the other evidence of guilt was so overwhelming that it is not reasonably probable that at least one juror would have declined to convict defendant had the jury not learned of her prior theft conviction. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *Cone v. Bell* (2009) 129 S.Ct. 1769, 1773.)

Defendant argues that, had the jury not known that she was a convicted thief, there is a reasonable chance that at least one juror would have believed the testimony by the defense witnesses that defendant had gone behind the clothing rack to scratch herself instead of to hide the perfume boxes, that she put the boxes in her bag only to free her hands for shopping, and that defendant paused by the security pylons to look around the exit for her son's girlfriend.

We find this doubtful because of the strength of the evidence indicating that defendant intentionally stole the perfume rather than took it from the store by accident. The prosecution's case consists of two videotapes of defendant in and just outside the JC Penney store, narrated by the JC Penney loss prevention officer, along with the loss prevention officer's testimony. The videotapes show that defendant: quickly selected three boxes containing perfume bottles from the fragrance counter; immediately left the fragrance department and walked along a wall into the women's clothing department; went behind a clothing rack and placed the three boxes into her Victoria's Secret

shopping bag; and, after purchasing a pair of shoes, lingered near the sensor pylons before leaving the store through the mall entrance, without paying for the perfume. On cross-examination, the loss prevention officer testified that defendant “look[ed] around” while she placed the perfume boxes in her bag behind the clothing rack. We find this overwhelming evidence of guilt and so conclude that, although the trial court erred in allowing the prosecution to reveal to the jury defendant’s prior theft conviction, the error was harmless.

DISPOSITION

The judgment is affirmed.

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RAMIREZ
P.J.

We concur:

McKINSTER
J.

KING
J.